BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARK D. FLEISCHMAN Claimant VS.	)	
	)	Docket No. 175,068
BOEING MILITARY AIRPLANES Respondent AND	)	
AETNA CASUALTY & SURETY COMPANY Insurance Carrier AND	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

ON the 22nd day of March, 1994, the applications of the claimant and the Kansas Workers Compensation Fund for review by the Workers Compensation Appeals Board of an Award entered by Special Administrative Law Judge William F. Morrissey, dated January 26, 1994, came on for oral argument by telephone conference.

APPEARANCES

The claimant appeared by and through his attorney, Steven L. Foulston of Wichita, Kansas. The respondent and its insurance carrier appeared by and through their attorney, Eric K. Kuhn of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, John C. Nodgaard of Wichita, Kansas. There were no other appearances.

RECORD

The record as specifically set forth in the Award of Special Administrative Law Judge William F. Morrissey is herein adopted by the Appeals Board.

STIPULATIONS

The stipulations as specifically set forth in the Award of Special Administrative Law Judge William F. Morrissey, are adopted by the Appeals Board. Included in the stipulations is an agreement between the respondent and the Kansas Workers Compensation Fund that the Fund shall be responsible for payment of eighty percent (80%) of all the compensation, medical expenses and costs incurred in this claim.

ISSUES

Both the claimant and the Kansas Workers Compensation Fund have requested the Appeals Board to review the following issues:

(1) Whether the claimant suffered a personal injury by accident arising out of and in the course of his employment with the respondent.

(2) What is the nature and extent of claimant's disability?

(3) Whether respondent is entitled to a K.S.A. 44-510a credit.

(4) Whether claimant was paid the proper number of weeks of temporary total disability benefits.

(5) Whether claimant is entitled to an unauthorized medical expense.

(6) Whether claimant is entitled to future medical treatment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record and the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

(1), (2) The claimant, Mark D. Fleischman, while performing his work-related activities, aggravated a pre-existing left shoulder condition during a series of events culminating on November 6, 1991, while employed by the respondent, Boeing Military Airplanes. As a result of this aggravation, the claimant has sustained a fifty-one percent (51%) permanent partial general disability based on work disability.

The claimant was employed by the respondent since September 1987, as a drivematic machine operator. A drivematic machine is an automatic fastening machine that drills holes and rivets sheet metal skin panels. Among other duties, the operator is required to load the machine with sheet metal skin panels and to manually operate hand cranks at approximately two-hundred (200) movements per hour. The claimant's dominate hand is his left hand.

Prior to the injury which is the subject of this claim, the claimant had a history of left shoulder problems while employed by the respondent. The first such injury occurred on May 10, 1989, while flipping a skin panel during the operation of the drivematic machine. He was first seen by the company doctors at Boeing Central Medical and then referred to Paul D. Lesko, M.D., an orthopedic surgeon in Wichita, Kansas. Dr. Lesko injected the claimant's shoulder, prescribed medication and exercises. He was released to return to regular work on June 27, 1989, without restrictions.

Claimant injured his left shoulder a second time on February 21, 1990, while loading a sheet metal skin panel onto the table of the drivematic machine. He was first seen by Boeing Central Medical and later referred for further treatment to Dr. Lesko on March 2, 1990. He was taken off work by Dr. Lesko and finally referred to Garrett Watts, M.D., an orthopedic surgeon in the same medical group as Dr. Lesko. After examination and evaluation, Dr. Watts performed arthroscopic acromioplasty and reattachment of the

labrum of claimant's left shoulder. Claimant was treated post-operatively with physical therapy. He was released for regular work without restrictions on September 25, 1990.

At claimant's attorney's request, Ernest R. Schlachter, M.D., examined and evaluated the claimant concerning permanent functional impairment and permanent restrictions on October 12, 1990. Dr. Schlachter diagnosed impingement syndrome, synovitis and tendinitis of the left shoulder. Dr. Schlachter opined that claimant had a ten percent (10%) impairment of function to the body as a whole as a result of his left shoulder injury. He went on to place permanent restrictions on the claimant's left arm of no lifting over twenty-five (25) pounds, no working above horizontal, and no excessive pushing or pulling. The claimant again was referred to Dr. Schlachter on June 26, 1991, after the claimant had been treated by Dr. Toohey in May 1991, for increased pain in his left shoulder as a result of his work activities. Dr. Schlachter's opinions on permanent functional impairment and permanent restrictions were the same at this time as he had expressed in October of 1990.

Jerry D. Hardin, human resource consultant, at the request of claimant's attorney, interviewed the claimant on November 27, 1990, concerning the issue of work disability. Utilizing Dr. Schlachter's permanent restrictions expressed in his medical report dated October 15, 1990, Mr. Hardin was of the opinion that the claimant had lost thirty-nine percent (39%) of his ability to perform work in the open labor market. With respect to the claimant's reduction in ability to earn comparable wage, Mr. Hardin indicated that there was no loss because claimant had returned to his regular job earning a comparable wage.

In a settlement hearing that was held in Wichita, Kansas, before Special Administrative Law Judge David Wood on October 31, 1991, the claimant settled all issues in reference to his left shoulder injury which occurred on May 10, 1989, and any subsequent injuries and aggravations through the date of settlement. The basis of this settlement is contained in the Form 12, Worksheet for Settlement, made a part of this proceeding by agreement of the parties. The worksheet indicates that the claimant's average weekly wage was $680.21, temporary total disability compensation was paid in the amount of $5,186.94, medical and hospital expenses were paid in the amount of $9,731.03, and a lump-sum settlement of $24,500.00 was paid, representing an approximate fifteen percent (15%) permanent partial general disability.

A few days after this settlement hearing on November 6, 1991, the claimant, while performing his normal duties as a drivematic machine operator, noticed a substantial increase in pain in his left arm. By the end of his regular shift, he could hardly lift his left arm because of the severe pain. That night after work he took Ibuprofen to help him sleep. He was unable to return to work the next day because of the severe pain.

On November 8, 1991, the claimant sought medical treatment from his family physician, Dr. Thomas Klein. He also reported this incident to Boeing Central Medical on November 8, 1991. Dr. Klein treated the claimant with a cortisone injection, placed him in physical therapy and took him off work. Dr. Klein then referred the claimant to Dr. Lesko for further medical treatment of his increasing problem with his left shoulder on November 25, 1991.

Dr. Lesko treated the claimant conservatively, prescribing a strengthening program through physical therapy. Finally, because claimant's condition was not improving, Dr. Lesko performed arthroscopic surgery for impingement and subacromial decompression on February 17, 1992. Following surgery, claimant was again placed in a physical therapy rehabilitation program. Dr. Lesko released the claimant to return to regular work on May

27, 1992, with temporary restrictions to limit overhead activities and pushing and pulling activities to one-hundred (100) times per hour.

Claimant testified that he did return to work on May 27, 1992, to his regular job as a drivematic machine operator. He worked until he was laid off as part of a general layoff on June 16, 1992. Claimant further testified that he performed his regular job activities during this period of time with increasing pain. He goes on to testify that if he had not been laid off on June 16, 1992, he could not have continued to operate the drivematic machine. He additionally testifies that he knows of no job the respondent has that he could do at the present time because of his continuing problems with his left arm and shoulder. The evidentiary record in this proceeding through the testimony of the claimant, Dr. Lesko, Dr. Schlachter, and William C. Hosman, vocational specialist, firmly establishes that as a result of claimant's work-related injury to his left shoulder and subsequent permanent restrictions, he cannot perform the job duties of a drivematic machine operator for the respondent.

Dr. Lesko released the claimant in August 1992 with a two to three percent (2-3%) permanent impairment of function. Dr. Lesko, on direct examination, testifies that the claimant's current problems with his left shoulder are a continuation of his pre-existing shoulder condition. However, on cross-examination, he testifies that the claimant was released in 1989 by him without restrictions and with no permanent impairment. Now, after the second surgical procedure he has had on his left shoulder, he does have a two to three percent (2-3%) functional impairment and permanent restrictions. Dr. Lesko also answered in the affirmative when asked whether the claimant's pre-existing left shoulder condition was aggravated by his work activities. Dr. Lesko, in a letter to the respondent's insurance carrier on December 16, 1992, placed the following permanent restrictions on the claimant: (1) limited overhead work activity; (2) limited lifting overhead of twenty-five (25) pounds or less; and, (3) limit activities such as pushing or pulling in front of the claimant to an occasional basis of less than one-third (⅓) of the time.

The claimant, at the request of his attorney, was again examined and evaluated by Dr. Schlachter, on April 29, 1993, concerning permanent functional impairment and permanent restrictions as a result of his latest injury to his left shoulder. After taking a history from the claimant, conducting a physical examination and reviewing the claimant's medical history, Dr. Schlachter's diagnosis was an aggravation of pre-existing impingement syndrome, synovitis and tendinitis of the left shoulder re-operated by Dr. Lesko. In reference to permanent functional impairment, it is the opinion of Dr. Schlachter that the claimant, as a result of this aggravation, has a fifteen percent (15%) permanent impairment to the body as a whole with ten percent (10%) of such impairment existing prior to the present aggravation. Dr. Schlachter imposed permanent restrictions on the claimant's left arm of no repetitive lifting of more than ten (10) pounds, no single lifts more than fifteen (15) pounds, no working above horizontal and no repetitive pushing and pulling movements. Dr. Schlachter also testified that the claimant would not have suffered his current injury and increased permanent impairment but for his pre-existing left shoulder condition.

Jerry D. Hardin, human resource consultant, again interviewed the claimant concerning the issue of work disability on April 29,1993. Utilizing Dr. Schlachter's permanent restrictions, Mr. Hardin opined that the claimant had lost thirty-five to forty percent (35-40%) of his ability to perform work in the open labor market. When applying Dr. Lesko's permanent restrictions, Mr. Hardin's opinion is that the claimant has lost forty to forty-five percent (40-45%) of his ability to perform work in the open labor market. Only a five percent (5%) loss of labor market is determined by Mr. Hardin if consideration is given to Dr. Schlachter's permanent restrictions placed on the claimant for his prior injury

in his report of October 15, 1990. The same labor market loss would result if you compare Dr. Schlachter's previous permanent restrictions with Dr. Lesko's present permanent restrictions. Claimant's comparable wage loss was determined by Mr. Hardin by comparing a pre-injury wage of $722.00 per month with a post-injury wage of $280.00 per month which amounts to a sixty-one percent (61%) loss.

In the instant case, the Special Administrative Law Judge found that the claimant was entitled to a work disability award in the amount of thirty-three percent (33%). In so finding, he gave equal weight to a labor market loss of five percent (5%) with a comparable wage loss of sixty-one percent (61%). Additionally, pursuant to K.S.A. 44-510a, the Special Administrative Law Judge gave a one-hundred percent (100%) credit for the claimant's previous settled prior injury to his left shoulder toward the compensation paid in this present claim.

On appeal, the respondent and the Kansas Workers Compensation Fund argue that the claimant did not suffer a permanent aggravation of his left shoulder problem, but only suffered a temporary flare-up. Accordingly, they contend that no additional compensation is due and owing for this temporary flare-up. In the alternative, they argue that if a permanent aggravation is found, then Dr. Lesko's opinion should be considered as the most credible medical evidence substantiating an award of two to three percent (2-3%) permanent partial general disability based on functional impairment. No work disability is due as the claimant returned to his regular job at comparable wage working from May 27, 1992 to June 16, 1992. Also, even if work disability is appropriate, claimant's own vocational rehabilitation expert, Jerry Hardin, testified that the claimant has sustained no increase in work disability as a result of the injury in this case.

During oral argument, claimant generally agreed with the Special Administrative Law Judge's work disability award. He does make an additional request for the Appeals Board to find that the claimant is entitled to unauthorized medical expense and future medical treatment. With respect to the K.S.A. 44-510a credit issue, claimant first argues that evidence of the previous settlement was not placed in the record, so the credit cannot be correctly calculated and is inappropriate. However, upon further review, the claimant acknowledged that he had agreed at the regular hearing that a K.S.A. 44-510a credit was an appropriate issue in this case and judicial notice could be taken concerning the October 31, 1991 settlement of the claimant's first claim.

The burden of proof is placed on the claimant in a workers compensation case to establish his right to an award of compensation and to prove the various conditions on which his right depends. See K.S.A. 44-501(a). The Appeals Board finds and concludes based on the whole record that the claimant has presented credible evidence through his own testimony and the testimony of Doctors Lesko and Schlachter that it is more probably true than not true that during the performance of his work-related activities while employed by the respondent he aggravated a pre-existing left shoulder condition culminating on November 6, 1991, causing additional injury to his left shoulder.

The next issue to be addressed is whether the claimant is entitled to permanent partial disability based on functional impairment or work disability. The Appeals Board finds and concludes that the credible evidence in the record supports a finding in favor of work disability. Claimant returned to work for a three (3) week period from May 27, 1992 through June 16, 1992, to his regular job with the respondent. However, he testified he had increased symptoms in his left arm and he would not have been able to continue to perform these job duties much longer if he had not been laid off because of the increased symptoms. Dr. Schlachter testified that the claimant's job duties in the operation of the

drivematic machine exceeded the claimant's permanent restrictions. Vocational specialist, William C. Hosman, testified that the claimant could not perform the job duties of the drivematic machine as such duties were outside of Dr. Lesko's permanent restrictions. Accordingly, even though the claimant was returned to his regular job at a comparable wage, the foregoing credible evidence rebuts the presumption of no work disability contained in K.S.A. 1990 Supp. 44-510e(a). See Locks v. Boeing Co., 19 Kan. App. 2d 17, 864 P.2d 738 (1993).

The only evidence contained in the record on the issue of work disability is the uncontradicted opinion of claimant's vocational expert, Jerry D. Hardin. In regard to loss of labor market, the Appeals Board finds that Mr. Hardin's personal opinion based on Dr. Schlachter's permanent restrictions and Dr. Lesko's permanent restrictions should be weighed equally to reach a forty percent (40%) loss.

In computing claimant's comparable wage loss, the Appeals Board finds that the weekly wage stipulated by the parties of $857.78, which includes fringe benefits, should be the claimant's pre-injury weekly wage. The evidentiary record has established that the claimant's current actual earnings from his job as a rental car agent which includes fringe benefits amounts to $324.38 per week. Accordingly, the Appeals Board finds that this wage best represents the claimant's ability to earn wages post-injury. When these two weekly wages are compared, the claimant has lost sixty-two percent (62%) of his ability to earn a comparable wage because of his work-related injuries. As long as the labor market loss and comparable wage loss factors are both considered, there is no particular formula mandated to arrive at the extent of permanent disability. Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 816 P.2d 409, rev. denied 250 Kan. 806 (1991). However, in this case, the Appeals Board finds no compelling reason that both factors should not be weighed equally. The Appeals Board, considering the whole evidentiary record, finds and concludes that the claimant should be entitled to a fifty-one percent (51%) permanent partial general disability award based on work disability. Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990).

Both the Kansas Workers Compensation Fund and the respondent contend that the prior restrictions placed on the claimant by Dr. Schlachter have to be considered in arriving at the reduction in the claimant's ability to perform work in the open labor market as a result of this injury. The respondent cites the case of Miner v. M. Bruenger & Co., Inc., 17 Kan. App. 2d 185, 836 P.2d 19 (1992) as requiring the vocational expert to take into consideration claimant's pre-existing permanent restrictions when expressing an opinion on a claimant's loss of ability to perform work in the open labor market and earn comparable wages. The Appeals Board disagrees with the respondent's interpretation of the Miner case. The Court of Appeals in Miner held that there was substantial competent evidence to support the District Court's finding that since Mr. Hardin failed to consider the claimant's prior restrictions, his opinions on labor market and comparable wage loss were not accurate. The Court of Appeals did not hold, as the respondent infers, that in a workers compensation case where work disability is an issue that the claimant's pre-existing conditions must be taken into consideration or a vocational expert's opinion is not competent evidence. In Miner, the Court of Appeals did not adopt the District Court's findings that the vocational expert's finding was inaccurate or unpersuasive. They simply held that there was substantial competent evidence to support the District Court's finding reducing the claimant's permanent partial disability rating. 17 Kan. App. 2d at 190.

The Appeals Board finds that the facts in this particular case do not support the finding that the claimant's pre-existing left shoulder restrictions should be considered in determining the reduction of claimant's ability to perform work in the open labor market and

to earn comparable wages. No restrictions were placed on the claimant when he returned to work for the respondent after his first left shoulder injury on September 25, 1990. At all times when the claimant was either off work because of his left shoulder and arm complaints or when he had been seen by the company doctor at Boeing Central Medical because of such complaints, he was always returned to his regular job duties as a drivematic machine operator without accommodation. When Dr. Schlachter first saw the claimant on October 12, 1990, after the first shoulder operation, he placed permanent restrictions on the claimant's left arm of no lifting over twenty (20) pounds, no working above horizontal and no excessive pushing and pulling. During Dr. Schlachter's deposition, claimant's counsel read to Dr. Schlachter from claimant's regular hearing testimony a description of the work activities required to operate a drivematic machine for the respondent. Dr. Schlachter was then asked if these job activities were outside the claimant's medical restrictions prior to his injury of November 6, 1991. Dr. Schlachter answered the question in the affirmative. He went on to answer in the affirmative that such job activities are certainly outside his present permanent restrictions.

The Appeals Board finds, based on the facts and circumstances of this particular case, that since the claimant was allowed by the respondent to perform work activities outside the permanent restrictions suggested by Dr. Schlachter up to the time of this injury, that it is inappropriate to consider these pre-existing restrictions when opinions are expressed on the issue of work disability.

In order to correctly calculate the claimant's disability in the case at hand, one has to take into consideration that the evidentiary record establishes that the claimant did return to his regular job at a comparable wage from May 27, 1992 through June 16, 1992, which amounts to a total of twenty-one (21) days or three (3) weeks. For this period of time, the claimant would only be entitled to permanent partial disability based on functional impairment as he did return to his regular job at a comparable wage. See K.S.A. 1990 Supp. 44-510e(a). The Appeals Board finds and concludes that for the period of May 27, 1992 through June 16, 1992 the claimant is entitled to a nine percent (9%) permanent partial general disability based on functional impairment found by weighing Dr. Lesko's three percent (3%) and Dr. Schlachter's fifteen percent (15%) functional impairment ratings equally. The compensation rate that will be paid during this period of time is based on the stipulated average weekly wage with fringe benefits. Fringe benefits should be subtracted as the worker had returned to his regular job, but the record does not contain evidence of an average weekly wage without the fringe benefits.

(3) The Appeals Board does find that based on the facts and circumstances of this case, the respondent is entitled to credit for the claimant's prior left shoulder injury which he settled on October 31, 1991, in a lump sum. K.S.A. 44-510a requires that when an employee has previously received compensation and then suffers a later injury, compensation payable for the later injury shall be reduced by the percentage of contribution that the prior disability contributed to the overall disability following the later injury. Dr. Schlachter testified that claimant would not have sustained his latest injury on November 6, 1991, but for his pre-existing left shoulder condition. The Appeals Board finds and concludes that a credit should be allowed respondent to the extent that the prior disability has contributed to the present disability which in this case is one-hundred percent (100%). See K.S.A. 44-510a(b).

(4) Before such a credit can be correctly calculated in the present case, the issue as to whether the correct number of weeks of temporary total disability benefits was paid herein has to be addressed. Subsequent to the hearing that was held before the Appeals Board, the parties filed a joint stipulation which stipulated that the respondent paid

temporary total disability benefits in this matter from November 11, 1991 through May 31, 1992, and from June 17, 1992 through March 9, 1993, at the maximum compensation rate of $289.00 per week. This is a total of sixty-seven (67) weeks which would equal a total amount paid of $19,363.00. However, the respondent entered into evidence at the regular hearing that it had actually paid temporary total disability benefits in the total amount of $19,652.00. As previously found above, the claimant returned to work for the respondent on May 27, 1992, and worked at his regular job and rate of pay through June 16, 1992, when he was laid off. Therefore, the claimant was paid temporary total disability benefits from May 27, 1992 through May 31, 1992, for a total of five (5) days while working at his regular job. The Appeals Board finds that the correct number of weeks that the respondent should have paid temporary total disability benefits is 66.29 weeks (67 weeks minus .71 weeks) at $289.00 per week or $19,157.81 instead of the actual amount paid of $19,652.00.

Having found the correct temporary total disability benefits, the overlapping weeks of credit in this case are calculated as follows:

(a) Since temporary total disability benefits are not subject to a credit reduction, the 66.29 weeks of temporary total disability benefits paid on the second injury plus the 3 weeks that the claimant actually returned to work for the respondent should be added to 130.14 weeks, which is the period of time between the first date of injury of May 10, 1989 and the second date of injury of November 6, 1991, equalling a total of 199.43 weeks.

(b) The 199.43 weeks are subtracted from the 415 week limit of the first injury which equals 215.57 overlapping weeks that credit is applicable.

(c) A total of 19.72 weeks of temporary total disability benefits were paid for the first injury, leaving 395.28 weeks for the period of time that the first injury would have been paid out, if it was paid as a running award instead of a lump sum settlement.

(d) The 395.28 weeks should be divided into the lump sum award of $24,500.00 to equal the weekly credit amount for the first injury of $61.98.

(5) As permitted in K.S.A. 1990 Supp. 44-510(c), unauthorized medical expense, if any, is awarded the claimant up to the $350.00 maximum allowance upon proper presentation of said expense to the respondent.

(6) The Appeals Board also finds that the claimant is entitled to future medical benefits upon proper application to and by approval of the Director of Workers Compensation on the basis of claimant's ongoing complaints of pain and discomfort in his left arm and shoulder.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey, dated January 26, 1994, is hereby modified and an award is entered as follows:

AN AWARD OF COMPENSATION IS HEREBY ENTERED IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR OF THE claimant, Mark D. Fleischman, and against the respondent, Boeing Military Airplanes, and its insurance carrier, Aetna Casualty & Surety Co., for an accidental injury sustained on November 6, 1991, and based upon an average weekly wage of $857.78.

Claimant is entitled to 66.29 weeks of temporary total disability compensation at the rate of $289.00 per week or $19,157.81, plus 3 weeks of permanent partial general disability compensation based on a 9% functional impairment at a reduced rate of $0.00 per week, followed by payment at a reduced rate of $227.02 per week for 215.57 weeks or $48,938.70, followed by payment at an unreduced rate of $289.00 per week until $31,903.49 is fully paid for a 51% permanent partial general disability, making a total award of $100,000.00.

As of October 26, 1994, there is due and owing the claimant 66.29 weeks of temporary total disability compensation at the rate of $289.00 per week or $19,157.81, plus 3 weeks permanent partial general disability at a reduced rate of $0.00 per week, plus 85.71 weeks permanent partial general work disability compensation at a reduced rate of $227.02 per week in the sum of $19,457.88 for a total due and owing of $38,615.69, which is ordered paid in one lump sum, less any amounts previously paid. Thereafter, the remaining balance of $61,384.31 shall be paid at the reduced rate of $227.02 per week for 129.86 weeks in the sum of $29,480.82, plus 110 weeks at the unreduced rate of $289.00 per week in the sum of $31,790.00, with one final payment of $113.49 or until further order of the Director.

The claimant is entitled to unauthorized medical up to the statutory maximum of $350.00 upon proper presentation of expenses.

Future medical benefits are to be awarded only upon proper application to and by approval of the Director of the Division of Workers Compensation.

As per the stipulation between the respondent and the Kansas Workers Compensation Fund, the Kansas Workers Compensation Fund is hereby ordered to reimburse the respondent for 80% of all compensation, medical expenses and costs incurred in this particular claim.

All other findings of Special Administrative Law Judge William F. Morrissey, in his Award dated January 26, 1994, are incorporated herein and made a part hereof as if specifically set forth in this Order to the extent that they are not inconsistent with the findings and conclusions expressed herein.

IT IS SO ORDERED.

Dated this ____ day of October, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

CONCURRING OPINION

I concur with the decision of the majority based upon the particular facts and circumstances of this case. Specifically, since the respondent chose to rely upon the opinion of Dr. Lesko who returned claimant to his regular duties without restrictions, and the claimant was allowed by the respondent to perform work activities outside the permanent restrictions recommended by Dr. Schlachter up to the time of his layoff following his present injury, that it is inconsistent for the respondent to now argue that the Appeals Board should consider the pre-existing condition and restrictions recommended by Dr. Schlachter when determining claimant's current work disability.

I would not, however, go so far as to say what could be inferred from the above opinion of the majority that a claimant's pre-existing condition is not necessarily a relevant factor when determining work disability. I would limit the work disability award to the facts of this case and not tie it to an interpretation of the decision by the Kansas Court of Appeals in Miner.

BOARD MEMBER

I join in the above concurring opinion.

BOARD MEMBER

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